



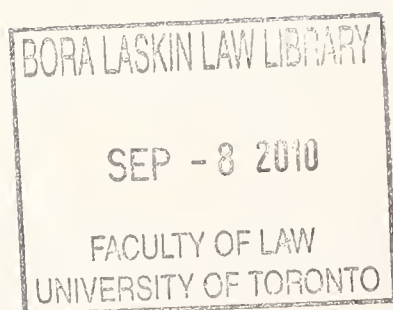
UNIVERSITY OF  
**TORONTO**  
FACULTY OF LAW



# International Investment Law: A New Global Constitutional Order?

Professor David Schneiderman

LAW235H1F  
Course Materials  
(Fall 2010)



**International Investment Law:  
A New Global Constitutional Order?**

Professor David Schneiderman

LAW235H1F  
Course Materials  
(Fall 2010)



Digitized by the Internet Archive  
in 2018 with funding from  
University of Toronto

<https://archive.org/details/internationalinv00schn>

# International Investment Law: A New Global Constitutional Order?

## Table of Contents

### I. Intellectual Origins

Edwin Borchard, "The Minimum Standard of Treatment of Aliens" (1939) 33 ASIL Proceedings 51-63 .....1

Alejandro Alvarez, "The Agrarian Reforms: The Hungarian Roumanian Controversy Before the League of Nations" pp. 46-50 .....9

### II. Customary International Law

*North American Dredging Company of Texas v. United Mexican States* (1926) 20 AJIL 800 .....12

*The Oscar Chinn Case* (12 December 1934) 1934 PCIJ Reports pp. 78-88.....20

*Barcelona Traction* [1970] ICJ Reports 3 paras. 33-103.....28

### III. Features of the Investment Treaty Regime

UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (New York & Geneva: UN, 2007), Pt II, A.....42

Kenneth J. Vandeveld, "The BIT program: A Fifteen-Year Appraisal" (1992) 86 ASIL Proceedings 532-540 .....45

Ibrahim Shihata, "Toward Greater Depoliticization of Investment Disputes: The Roles of ICSID and NIGA" (1986) 1(1) ICSID Review 1, pp. 1-12 .....53

### IV. Appeals

ICSID Convention on Annulment, Art. 52(1) .....59

Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2009) pp. 900-904..... 59

### V. Consent to Arbitration

*Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (Decision on Annulment) (3 July 2002) Case No ARB/97/3, IIC 70, paras. 93-115 ... 62

*Mobil Corporation Venezuela Holdings BV and ors v. Venezuela* (Decision on Jurisdiction), ICSID Case No ARB/07/27; IIC 435 (10 June 2010), paras. 62-74, 86-88, 120-41 ..... 69

### VI. Applicable Law

Vienna Convention on the Law of Treaties, Art. 31 ..... 75

ICSID Convention, Art. 42..... 75

*Compañía del Desarrollo de Santa Elena SA v. Costa Rica* (Final Award) (17 February 2000), ICSID Case No ARB/96/1, IIC 73, paras. 60-67 ..... 76

### VII. Jurisdiction

#### *Subject Matter: Investments*

*Saluka Investments BV v. Czech Republic*, Partial Award, PCA—UNCITRAL Arbitration Rules; IIC 210, paras. 203-17 ..... 79

Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2009) pp. 128-34..... 83

*Inmaris Perestroika Sailing Maritime Services GmbH and ors v Ukraine*, Decision on Jurisdiction, ICSID Case No ARB/08/8; IIC 431 (8 March 2010), paras. 126-34 .....87

*Pantechniki SA Contractors and Engineers v. Albania* (Award), ICSID Case No ARB/07/21; IIC 383 (28 July 2009), paras. 32-49..... 89

### *Standing: Investors*

CMS Gas Transmission Co v Argentina (Decision on objections to jurisdiction), ICSID Case No ARB/01/8; IIC 64 (2003); 42 ILM 788 (17 July 2003), paras. 1-82 ..... 93

### *Standing: Nationality*

Tokios Tokelès v. Ukraine, Decision on Jurisdiction and Dissent, ICSID Case No ARB/02/18; IIC 258 (20 April 2004), paras. 27-93, dissenting opinion of Prosper Weil, paras. 1-30 ..... 107

Aguas del Tunari SA v Bolivia (Decision on Respondent's Objections to Jurisdiction), ICSID Case No ARB/02/3, IIC 8 (21 August 2005), paras. 205-65 ..... 128

Loewen Group Inc and Loewen v United States (Award) ICSID Case No ARB(AF)/98/3, IIC 254 (25 June 2003), paras. 218-42 ..... 140

Mobil Corporation Venezuela Holdings BV and ors v. Venezuela (Decision on Jurisdiction), ICSID Case No ARB/07/27; IIC 435 (10 June 2010), paras. 186-206 ....  
..... 147

## VIII. National Treatment

SD Myers Inc v. Canada (First Partial Award and Separate Opinion), Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (13 November 2000), paras. 238-56 ..... 150

Methanex Corporation v. United States (Final Award on Jurisdiction and Merits), Ad hoc—UNCITRAL Arbitration Rules; IIC 167 (3 August 2005), Part IV, Chapter B Article 1102, paras. 1-38 ..... 154

Occidental Exploration and Production Company v. Ecuador (Award), LCIA Case No UN 3467, IIC 202 (1 July 2004), paras. 167-79

United Parcel Service of America Inc v Canada, Award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 306 (24 May 2007), paras. 146-55, 173-81, separate opinion, paras. 94-102, 124-33, 148-52, 197-98 ..... 163

United Parcel Service of America Inc v Canada, Award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 306 (24 May 2007), paras. 146-55, 173-81, separate opinion, paras. 94-102, 124-33, 148-52, 197-98 ..... 167

## IX. Most-Favored Nation

### *Procedural*

Maffezini v. Spain (Decision on Objections to Jurisdiction), ICSID Case No ARB/97/7, IIC 85 (25 January 2000), paras. 38-64 ..... 172

Plama Consortium Limited v Bulgaria (Decision on Jurisdiction), ICSID Case No ARB/03/24, IIC 189 (8 February 2005), paras. 183-227 ..... 178

### *Substantive*

Técnicas Medioambientales Tecmed SA v. Mexico (Award), ARB(AF)/00/2; IIC 247 (29 May 2003), paras. 53-71 ..... 186

MTD Equity Sdn Bhd and MTD Chile SA v. Chile (Award), ICSID Case No ARB/01/7; IIC 174 (25 May 2004), paras. 100-04.. 194

Austrian Airlines v. Slovakia (Final Award), Ad hoc—UNCITRAL Arbitration Rules; IIC 434 (9 October 2009), paras. 89-108, full dissenting opinion, paras. 1-10 ..... 196

## X. Expropriation

Metalclad Corp v. Mexico (Award), Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (25 August 2000), paras. 102-112 ..... 203

Pope & Talbot Inc v Canada, Interim Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 192 (26 June 2000), paras. 81-105 ..... 206

SD Myers Inc v. Canada (First Partial Award and Separate Opinion), Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (13 November 2000), paras. 279-288 ..... 211  
Methanex Corporation v. United States (Final Award on Jurisdiction and Merits), Ad hoc—



UNCITRAL Arbitration Rules; IIC 167 (3 August 2005), Part IV, Chapter D, Article 1110, paras. 1-18..... 213

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina, (Award), ICSID Case No ARB/97/3, IIC 307 (20 August 2007), paras. 7.5.1-7.5.34 (whole of 7.5) ..... 216

Siag and Vecchi v. Egypt (Award), ICSID Case No ARB/05/15; IIC 374 (11 May 2009), paras. 427-44..... 222

## XI. Minimum Standard of Treatment

Neer v. United Mexican States (1926) Mexico-USA General Claims Commission..... 226

Pope & Talbot Inc v Canada, Award on the Merits of Phase 2, Ad hoc—UNCITRAL Arbitration Rules, IIC 193 (2001), paras. 105-118..... 233

Mondev International Ltd v United States, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (11 October 2002), paras. 94-125 ..... 236

Glamis Gold Ltd v. United States (Award), Ad hoc—UNCITRAL Arbitration Rules; IIC 380 (14 May 2009), paras. 598-627 ..... 244

Merrill & Ring Forestry LP v. Canada (Award), Ad hoc—UNCITRAL Arbitration Rules; IIC 427 (31 March 2010), paras. 182-213..... 251

## XII. Fair and Equitable Treatment

Técnicas Medioambientales Tecmed SA v. Mexico (Award), ARB(AF)/00/2; IIC 247 (29 May 2003), paras. 152-74..... 257

International Thunderbird Gaming Corporation v. Mexico (Award), Ad hoc—UNCITRAL Arbitration Rules, IIC 136 (26 January 2006), paras. 145-67, separate opinion paras. 21-30..... 266

CMS Gas Transmission Company v. Argentina (Award), ICSID Case No

ARB/01/8, IIC 65 (12 May 2005), paras. 266-84 ..... 274

## XIII. Exceptions (Defence of Necessity)

CMS Gas Transmission Company v. Argentina (Decision on Application for Annulment), ICSID Case No ARB/01/8; IIC 303 (31 August 2007), paras. 101-36.... 277

Sempra Energy International v. Argentina (Decision on Argentina's Application for Annulment of the Award), ICSID Case No ARB/02/16; IIC 438 (10 June 2010), paras. 186-219 ..... 283

## IX. Umbrella Clause

SGS Société Générale de Surveillance SA v. Pakistan (Decision on Objections to Jurisdiction), ICSID Case No ARB/01/13; IIC 223 (6 August 2003), paras. 163-74 ..... 289

Eureko BV v. Poland (Partial Award and Dissenting Opinion), Ad hoc—UNCITRAL Arbitration Rules, IIC 98 (19 August 2005), paras. 244-60 ..... 293

## X. Damages

Chorzow Factory (Merits) No. 13 (13 September 1928) pp. 29, 46-50 ..... 299

Luke Eric Peterson, "How Many States Are Not Paying Awards Under Investment Treaties?" Investment Arbitration Reporter (7 May 2010) ..... 303

## XI. Arbitral Conflicts of Interest

Vivendi v. Argentina, Decision on Application for Annulment, ICSID Case No ARB/97/3 (10 August 2010), paras. 200-42 ..... [to be distributed]

